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June 14, 2004

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VIA HAND DELIVERY

Hon. Deborah Taylor Tate, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re: *Planet Connect Letter Complaint*
Docket No. 04-00131

Dear Chairman Tate

Consistent with Tennessee Regulatory Authority ("Authority") Rule 1220-1-2- 03, BellSouth provides this response to the letter complaint filed by Mr. Evan B. McKinley, a systems consultant for Planet Connect.¹

I. Introduction

Planet Connect requests that the Authority change course and reverse itself on the DSL over UNE-P issue recently decided by the Authority in the DeltaCom Arbitration. Planet Connect relies solely on decisions made in Kentucky. Specifically, Planet Connect states that "... BellSouth is in violation of both the [Kentucky] PSC decision and the [Kentucky] U.S. District Court ruling by refusing DSL internet access for this Morristown business with AT&T phone service." Planet Connect also claims that the U.S. District Court decision controls in Tennessee.²

BellSouth assumes that Mr. McKinley is not a lawyer and simply does not understand that the Kentucky decisions do not control in Tennessee. Moreover, BellSouth assumes that Planet Connect is unaware of both the Authority's recent decision in the DeltaCom Arbitration and the FCC's unanimous decision in its Triennial

¹ Planet Connect's letter was apparently received by the Authority on April 22, 2004. However, Planet Connect failed to provide a copy of this letter to BellSouth. On May 13, 2004, the Authority's General Counsel provided a copy of the letter to BellSouth and requested a response within 30 days, or no later than June 14, 2004.

² See Planet Connect's letter dated April 19, 2004, at p. 1.

Review Order ("TRO") rejecting efforts to compel ILECs into providing broadband service to CLEC UNE voice customers

Finally, Planet Connect's letter acknowledges that it resells wholesale DSL Transport. BellSouth's wholesale DSL Transport is a federally tariffed interstate service. The FCC's determination that BellSouth's wholesale DSL Transport service be federally tariffed necessarily means that the Authority lacks jurisdiction over that tariff. Planet Connect's letter is an invitation for the Authority to rule on an interstate service. The Authority should decline that invitation.

II. Planet Connect, relying solely on Kentucky rulings which do not control in Tennessee, is seeking to relitigate the same issue previously addressed by the Authority in the DeltaCom Arbitration.

Planet Connect is seeking to relitigate the same issue previously addressed by the Authority in the DeltaCom Arbitration – whether BellSouth should be forced to continue providing DSL-based services on CLEC UNE lines. After hearing three days of testimony and extensive cross-examination on the DSL over UNE-P issue, the Authority ruled in January of this year that BellSouth was not required to provide broadband service to CLEC UNE voice customers. Both BellSouth and DeltaCom submitted numerous legal arguments in support of their respective positions on this issue. The Authority deliberated and decided, consistent with federal law, not to compel BellSouth to provide DSL to UNE or UNE-P voice customers of DeltaCom – the same relief Planet Connect seeks in its letter.

Now Planet Connect wants the Authority to reverse course based upon rulings in Kentucky, which have been challenged and are subject to a pending appeal³. Obviously, the Kentucky decisions do not apply to Tennessee, and the Authority is not bound by them. As further explained below, the Authority "got it right" when it decided in the DeltaCom Arbitration not to compel BellSouth to provide DSL service to UNE voice customers.⁴

³ See *BellSouth Telecommunications, Inc. v. Cinergy Communications Co.*, No. 03-23-JMH, 2003 U.S. Dist. LEXIS 23976 (E.D. Ky. Dec. 29, 2003) in which the Court does not even mention the TRO in its Opinion. BellSouth has appealed this decision to the Sixth Circuit and requested that the Court of Appeals hold briefing in the case in abeyance pending the FCC's resolution of BellSouth's *Request for Declaratory Ruling that State Commissions May Not Regulate Broadband Internet Access Service by Requiring BellSouth to Provide Wholesale or Retail Broadband Services to CLEC UNE Voice Customers*. On March 3, 2004, the Sixth Circuit granted BellSouth's request. See Case No. 04-5128.

⁴ *In Re: Petition for Arbitration of ITC^DeltaCom Communications, Inc. with BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996*; Docket No. 03-00119.

Review Order ("TRO") rejecting efforts to compel ILECs into providing broadband service to CLEC UNE voice customers

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III. Federal law provides that ILECs may not be compelled into providing broadband services to CLEC UNE voice customers.

It is now settled federal law that ILECs may not be dragooned into providing broadband service to CLEC UNE voice customers. In the TRO, the FCC expressly held that ILECs need not provide data services on CLEC UNE voice lines. In paragraph 270 of the TRO, the FCC rejected CompTel's request that the FCC establish a low-frequency portion of the UNE loop as a way of requiring BellSouth to provide DSL service to CLEC UNE voice customers. The FCC expressly concluded that, contrary to CompTel's position, forcing BellSouth to offer broadband service is not pro-competitive. Rather, competition and consumers benefit if CLECs have incentives either to develop competing broadband service themselves or to "partner" with another competitive provider "to take full advantage of an unbundled loop's capabilities."⁵

BellSouth cannot put this point any better than a federal court recently did in rejecting a class-action complaint based on BellSouth's DSL over UNE-P policy.

[T]he FCC, in its *Triennial Review Order*, has already examined possible competitive benefits from requiring ILECs to provide their DSL service to CLEC customer, and it has determined not only that such a regulatory requirement would bring no benefit, but also that it would discourage investment and innovation and thus harm consumers.⁶

Recent comments filed by other parties in the FCC's *Declaratory Ruling Proceeding* underscore this.⁷ For example, although Americatel opposes BellSouth's

(the "DeltaCom arbitration") The Authority's deliberations with respect to the DSL over UNE-P issue took place on January 12, 2004. Director Ron Jones dissented from the majority's ruling. See p. 10 of transcript of Authority deliberations of January 12, 2004 in Docket 03-00119.

⁵ 18 FCC Rcd at 17141, ¶ 270.

⁶ *Levine v. BellSouth Corp.*, 302 F. Supp. 2d 1358, 2004 U.S. Dist. LEXIS 23253 at p. 9. Consistent with the Authority's ruling in the DeltaCom Arbitration, the *Levine* Court also squarely determined that BellSouth's practice does not constitute an illegal "tying" arrangement. The FCC also rejected CompTel's "tying" claim in the TRO. See TRO at ¶ 276.

⁷ On December 9, 2003, BellSouth filed its *Request for Declaratory Ruling That State Commissions May Not Regulate Broadband Internet Access Services by Requiring BellSouth to Provide Wholesale or Retail Broadband Services to CLEC UNE Voice Customers*. BellSouth requested that the FCC issue an expedited declaratory ruling to provide relief from certain state commission decisions that are directly contrary to the TRO, as well as other sources of federal law. The comment cycle in that

request for relief in that proceeding; Americatel forthrightly concedes that, in the TRO, the FCC decided "to permit ILECs to refuse to provide DSL services to CLEC voice customers"⁸ Catena, an equipment make whose sole interest in participating in the *Declaratory Ruling Proceeding* is in enhancing broadband deployment, similarly explains that the FCC has "already determined these issues" and that state commission rulings compelling BellSouth to provide DSL over UNE-P are "inconsistent" with the TRO.⁹

The TRO further establishes that, where, as here, the FCC has found "no impairment", state commission decisions imposing the same obligation rejected by the FCC will almost invariably be preempted under 47 USC § 251(d)(3).¹⁰ The TRO likewise establishes that states may not "thwart" or "frustrate" the FCC's judgment of national policy by adopting contrary requirements¹¹

Indeed, even before the TRO, the FCC repeatedly concluded that BellSouth's policy was not merely consistent with federal law, but also affirmatively nondiscriminatory. For instance, in the *Georgia Louisiana 271 Order*,¹² the FCC not only rejected claims that BellSouth's policy violated federal law, but also found that "[f]urthermore," in light of the ability to engage in line splitting, it "cannot agree" with the claims made by AT&T, CompTel, and others that the same policy at issue here is "discriminatory".¹³

The FCC reiterated these conclusions in the *BellSouth Five-State 271 Order*,¹⁴ where it again emphasized the ability of CLECs to engage in line splitting and again affirmatively rejected claims of discrimination. The FCC repeated its conclusion in the

matter is complete, and the parties are awaiting a decision from the FCC See FCC WC Docket No 03-251

⁸ Americatel at 15, see *id* at 4 in WC Docket No 03-251 (acknowledging that the FCC has "bar[red] the states from requiring ILECs to provide DSL service to CLEC customers")

⁹ Catena at 6, 7, see also Verizon at 7-8 in WC Docket No 03-251

¹⁰ See *id* at 17101, ¶195

¹¹ 18 FCC Rcd at 17099-100, ¶¶ 92, 94 , 196

¹² Memorandum Opinion and Order, *Joint Application by BellSouth Corporation, et al for Provision of In-Region, InterLATA Services in Georgia and Louisiana*, 17 FCC Rcd 9018 (2002) ("*Georgia/Louisiana 271 Order*")

¹³ 17 FCC Rcd at 9100-01, ¶157 & n 562

¹⁴ Memorandum Opinion and Order, *Joint application by BellSouth Corporation, et al for Provision of In-Region, InterLATA Services in Alabama, Kentucky, Mississippi, North Carolina and South Carolina*, 17 FCC Rcd 17595 (2002) ("*BellSouth Five-State 271 Order*")

Florida/Tennessee 271 Order, rejecting claims that BellSouth's DSL over UNE-P policy was contrary to the public interest.¹⁵

As noted above, a federal court has recently explained that the TRO resolved this question. In dismissing with prejudice a class-action complaint challenging the same BellSouth policy at issue here, the federal court concluded that "the FCC, in its TRO, has already examined possible competitive benefits from requiring ILECs to provide their DSL service to CLEC customers, and it has determined not only that such a regulatory requirement would bring no benefit, but also that it would discourage investment and innovation and thus harm consumers".¹⁶ The court thus properly read the TRO as "actively examin[ing] and affirmatively reject[ing] the claimed *competitive* benefits" of imposing a "regulatory duty" on BellSouth to offer broadband service to CLEC voice customers.¹⁷

Also, BellSouth's wholesale DSL transport service is a federally-regulated and federally-tariffed interstate service. Federal law is clear that state agencies lack authority to regulate interstate telecommunications services, that is emphatically the case as to services offered under a federal tariff filed with the FCC. BellSouth's wholesale DSL transport service is provided under such an interstate tariff, and thus it is subject to the exclusive jurisdiction of the FCC. State commission decisions that purport to interpret federal tariffs or that impose terms and conditions on that tariffed wholesale service either by itself or as a component of BellSouth's FastAccess® service are thus unlawful.

Planet Connect's letter states that it resells wholesale DSL Transport Service. BellSouth's wholesale DSL Transport service is provided under an interstate tariff, FCC Tariff No. 1. BellSouth's DSL Transport tariff is obviously a federal, not a state tariff. Planet Connect's letter is an invitation for the Authority to rule on an *interstate* service. The Authority should decline this invitation. The FCC's determination that BellSouth's wholesale DSL transport service be federally tariffed necessarily means the Authority lacks jurisdiction over that tariff.

Of particular relevance here, the FCC has concluded that wholesale DSL transmission service, when used for Internet access, is jurisdictionally interstate

¹⁵ See 17 FCC Rcd at 17683, ¶164, see also Memorandum Opinion and Order, *Application by BellSouth Corporation, et al., for Authorization to Provide In-Region, InterLATA Services in Florida and Tennessee*, 17 FCC Rcd 25828 25825 (2002) ("*Florida/Tennessee 271 Order*"), and 17 FCC Rcd at 25922, ¶178

¹⁶ *Levine*, slip op at 21

¹⁷ *Id*

under the 10% rule applicable to such special access services.¹⁸ The FCC thus concluded that DSL transmission for Internet access is an interstate "special access service. warranting *federal* regulation", and in particular, federal tariffing.¹⁹

As federal courts have repeatedly held, state commissions have no authority to regulate the terms and conditions of services offered under a federal tariff; indeed, if they did, that would undermine the uniformity that a federal tariff is intended to create.

As the Second Circuit has explained, "[t]he published tariff rate will not be uniform if the service for which a given rate is charged varies from state to state according to differing state requirements."²⁰ Accordingly, the relevant rule is that, as Judge Posner has explained, state law cannot be used to vary a federally tariffed service: "Federal law does not merely create a right; *it occupies the whole field, displacing state law.*"²¹ For these reasons, two federal courts have held last year that state commissions are prohibited from regulating federally tariffed, federally regulated, interstate special access services.²²

Likewise, some state commissions have affirmatively acknowledged that they lack authority to regulate federally-tariffed services because that would entail an unlawful modification of the terms and conditions of a federal tariff. The Massachusetts Department of Telecommunications and Energy, for instance, rejected a CLEC request to regulate interstate special access performance because, as it explained, "[i]n order for [it] to regulate the quality of federally-tariffed special access services, [it] would need a delegation of authority from the FCC."²³ The Massachusetts Commission further explained that it could not grant a request to regulate interstate special access

¹⁸ See *GTE Tariff Order*, 13 FCC Rcd at 22476, ¶19

¹⁹ *Id.* at 22480, ¶25 (emphasis added)

²⁰ *Ivy Broad. Co.*, 391 F.2d at 491

²¹ *Cahnmann v. Sprint Corp.*, 133 F.3d 484, 488-89 (7th Cir. 1998), see *AT&T Co. v. Central Office Tel., Inc.*, 524 U.S. 214 (1998) (filed tariff determines terms and conditions as well as rates, and neither may be altered)

²² See *Qwest Corp. v. Scott*, No. 02-3563, 2003 WL 79054, at *10 (D. Minn. Jan. 8, 2003) (state regulation was expressly preempted because the FCC had "determined that mixed-use special access is to be classified as interstate unless it contains 10% or less interstate traffic"), *Illinois Bell Tel. Co. v. Globalcom, Inc.*, No. 03-C-0127, 2003 WL 21031964 at *2 (N.D. Ill., May 6, 2003) (holding that state commission lacked jurisdiction to invalidate federal tariff's early termination charge because the special access service at issue was "**assigned to the FCC's jurisdiction under federal tariffs**") (emphasis added)

²³ Order on AT&T Motion to Expand Investigation, *Investigation by the Department of Telecommunications and Energy on Its Own Motion Pursuant to G.L.C. 159, §§ 12 & 16, into Verizon*

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because to do so would be inconsistent with the FCC's exclusive jurisdiction over the quality of service of federally tariffed special access services. The Department concludes that it is pre-empted from investigation and regulating quality of service for federally tariffed special access services.²⁴

Similarly, the New York Public Service Commission decided to seek a delegation of authority from the FCC because it lacked independent authority to regulate interstate special access²⁵

This same analysis applies with respect to Planet Connect's request. Because DSL, a form of interstate special access, is subject to the exclusive authority of the FCC, it cannot be regulated by the states.

Indeed, Planet Connect's request that the Authority require BellSouth to provide DSL to CLEC UNE voice customers is unlawful for the additional reason that it not only adds a term or condition to BellSouth's federally tariffed service, but also affirmatively contradicts BellSouth's filed tariff. BellSouth's DSL Transport tariff specifies that the "designated end-user premises location" must be "served" by an "existing, in-service, Telephone Company provided exchange line facility."²⁶ "Telephone Company" is a defined term in the tariff and it refers to BellSouth.²⁷ When a CLEC provides voice service to a customer using an unbundled loop, that customer is not being served by a "BellSouth-provided" exchange line facility. Indeed, the FCC has specifically determined that, when a CLEC leases a loop, it, **not** the incumbent carrier, controls that facility, and has the exclusive right to use it.²⁸ BellSouth cannot be "providing" a facility that it does not control and that another party has the exclusive right to use.

New England Inc d/b/a Verizon Massachusetts' Provision of Special Access Services, D T E 01-34, 2001 Mass PUC LEXIS 94, at *16 (Mass D T E Aug 9, 2001)

²⁴ *Id* , at *18-*19

²⁵ See New York Pub Serv Comm'n Press Release, *PSC Strengthens Verizon's Service Quality Standards for "Special Services"* (May 23, 2001) (describing letter requesting FCC delegation of authority)

²⁶ BellSouth Tariff F C C No 1, § 7 2 17(A)

²⁷ See BellSouth Tariff F C C No 1, § 1 1 (Dec 16, 1996)

²⁸ See, 47 C F R § 51 309, First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 15635, ¶1268 (1996) ("[A] telecommunications carrier purchasing access to an unbundled network facility is entitled to **exclusive** use of that facility ") (emphasis added) (subsequent history omitted)

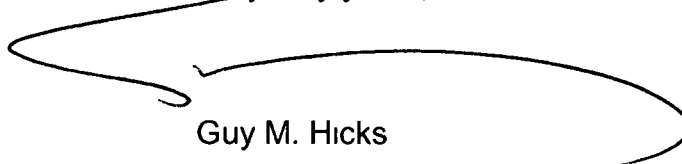
BellSouth's FCC Tariff is fully consistent with the TRO. Planet Connect is asking the Authority to order BellSouth to provide DSL broadband service to CLEC UNE voice customers. Clearly, any such order would fly in the face of the FCC's holding in the TRO that incumbents are not required to provide broadband services over the same UNE loops that CLECs use to provide voice services.²⁹ The FCC explained that, because voice CLECs can either provide voice and data services to their customers or engage in line splitting with other CLECs, incumbents should not be forced to provide broadband services to CLEC UNE voice customers.³⁰ In any event, this issue involves an interstate, federally tariffed service that is subject to the FCC's jurisdiction.

IV. Conclusion

The Authority's ruling in the DeltaCom Arbitration is fully consistent with the FCC's unanimous judgment in the TRO that ILECs should not be compelled into providing broadband service to CLEC UNE voice customers. Planet Connect seeks the same relief DeltaCom sought. There is no reason or legal basis for the Authority to reverse its earlier decision. The Kentucky decisions upon which Planet Connect relies do not control in Tennessee and are subject to a pending appeal. In fact, the federal court decision rendered in the *Levine* case subsequent to the Kentucky decisions provides further support that the TRA "got it right" in the DeltaCom Arbitration. Finally, the Authority lacks jurisdiction to regulate the terms and conditions of a service offered under a federal tariff, and Planet Connect purchases wholesale DSL Transport provided pursuant to FCC Tariff No. 1.

For all of these reasons, BellSouth requests that the Authority not grant Planet Connect the relief requested in its letter. A copy of this letter is being provided to Planet Connect.

Very truly yours,

A large, stylized handwritten signature in black ink, appearing to read "Guy M. Hicks".

Guy M. Hicks

GMH:ch

²⁹ See 18 FCC Rcd at 17141, ¶270

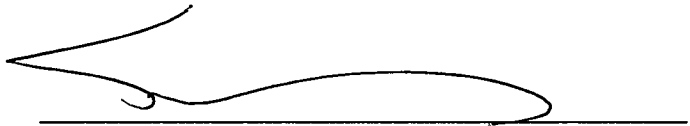
³⁰ See *Id*

CERTIFICATE OF SERVICE

I hereby certify that on June 14, 2004, a copy of the foregoing document was served on the following, via the method indicated:

- ☐ Hand
- ☐ Mail
- ☐ Facsimile
- ☐ Overnight
- ☒ Electronic

Mr. Evan B. McKinley
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A handwritten signature in black ink, appearing to read "Evan B. McKinley", is written over a horizontal line.